FILE COPY

JAN 24 1936

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 715

THE ATLANTIC LUMBER COMPANY,
Appellant,

vs.

COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS.

APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

STATEMENT AS TO JURISDICTION.

ROBERT C. MCKAY,
Counsel for Appellant.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	1
Statute of the State the validity of which is involved	2
Date of the judgment sought to be reviewed and date upon which application for appeal was presented	5

Table of Cases Cited.

Alpha Portland Cement Co. v. Commonwealth, 248 Mass. 151	2
Alpha Portland Cement Co. v. Commonwealth, 266 U. S. 203	4
Ozark Pipe Line Co. v. Monier, 268 U. S. 555	4, 5

Statutes Cited.

Constitution of the United States, Article I, Section 8	4, 5
14th Amendment	4, 5
General Laws of the Commonwealth of Massachusetts, Chapter 63 (pages 785-793, General Laws of the Commonwealth of Massachusetts, Tercentenary Edition)	2
General Laws of the Commonwealth of Massachusetts, Tercentenary Edition, C. 63, sec. 30 (4)	2
C. 63, sec. 38, page 789	3
C. 63, sec. 38 (5), page 789	3
C. 63, sec. 38 (6), page 789	4
C. 63, sec. 39, page 791	2
C. 63, sec. 75	4
Judicial Code, Section 237 (a), as amended by the Act of January 31, 1928	1
Rules and Regulations of the Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts, No. 2505	2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 715

THE ATLANTIC LUMBER COMPANY,
Appellant,

vs.

COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS,
Appellee.

STATEMENT AS TO JURISDICTION.

Pursuant to Rule 12 of the Rules of the United States Supreme Court, the Appellant files this statement disclosing the basis upon which it is contended that the United States Supreme Court has jurisdiction upon appeal.

(a) The case is one which, under legislation in force when the Act of January 31, 1928, was passed, to wit, under Sec. 237 (a) of the Judicial Code, a review could be had in the Supreme Court of the United States as a matter of right on a writ of error in that there is drawn in question the validity of a statute of the Commonwealth of Massachusetts on the ground of it being repugnant to the Con-

stitution of the United States and the decision is in favor of its validity.

(b) The statute of the Commonwealth of Massachusetts, the validity of which is involved, is Chapter 63 of the General Laws of the Commonwealth of Massachusetts (pages 785-793, General Laws of the Commonwealth of Massachusetts, Tercentenary Edition). This statute provides that "Every foreign corporation shall pay annually, with respect to the carrying on or doing of business by it within the Commonwealth, an excise equal to the sum of * * * five dollars per thousand upon the value of the Corporate Excess employed by it within the Commonwealth" and "two and one-half per cent of that part of its net income * * * which is derived from business carried on within the Commonwealth;" (G. L. Ter. Ed., C. 63, Sec. 39, page 791).

"'Corporate Excess employed within the Commonwealth' by a foreign corporation * * * (shall be) such proportion of the fair value of its capital stock on the last day of the taxable year * * * as the value of its assets, both real and personal, employed in any business within the Commonwealth on that date, bears to the value of the total assets of the corporation on said date" (G. L. Ter. Ed., C. 63, Sec. 30 (4)). The method of apportioning the intangible assets of a foreign corporation to Massachusetts is not set out in the statute but is covered by a Regulation of the Commissioner of Corporations and Taxation and this Regulation was held to be in conformity with the statute by the Massachusetts Supreme Judicial Court in *Alpha Portland Cement Co.* v. *Commonwealth*, 248 Mass. 156,161. This Regulation (No. 2505, Rules and Regulations of the Commissioner of Corporations and Taxation) provides in effect that the apportionment shall be made on the same basis as that provided by the statute for the allocation of the so

called remainder of Net Income. This allocation is based on three factors which are given equal weight in apportioning the remainder of Net Income and the intangible assets of a foreign corporation (G. L. Ter. Ed., C. 63, Sec. 38, page 789). The first factor is based on the value of the Corporation's tangible property situated within the Commonwealth and one-third of the remainder of Net Income and one-third of the value of the intangible assets is allocated by multiplying by a fraction whose numerator is the value of the Corporation's tangible property situated in Massachusetts and the denominator is the total value of the Corporation's property wherever situated. The second factor is based on wages, salaries and commissions paid employees which are assignable to Massachusetts. "The amount assignable to this commonwealth of expenditure of the corporation for wages, salaries, commissions or other compensation to its employees shall be such expenditure for the taxable year as represents the compensation of employees not chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside the Commonwealth" (G. L. Ter. Ed., C. 63, Sec. 38 (5), page 789). One-third of the remainder of net income and one-third of the value of the intangible assets is therefore allocated by multiplying by a fraction whose numerator is the wages, salaries and commissions so assignable to Massachusetts and the denominator is the total expenditure of the corporation for wages, salaries and commissions. The third factor is based on gross receipts from sales assignable to Massachusetts. "The amount of the corporation's gross receipts from business assignable to this commonwealth shall be the amount of its gross receipts for the taxable year from (a) sales, except those negotiated or effected in behalf of the corporation by agents or agencies chiefly situated at, connected with or sent out from premises for the

transaction of business owned or rented by the corporation outside the commonwealth and sales otherwise determined by the Commissioner to be attributable to the business conducted on such premises" (G. L. Ter. Ed., C. 63, Sec. 38 (6) page 789). The remaining third of the remainder of net income and the value of intangible assets is therefore allocated by multiplying by a fraction whose numerator is the gross receipts from sales so assigned to Massachusetts and whose denominator is the amount of the corporation's gross receipts from all its business.

The statute further provides for a minimum tax, annual returns and additional information to be furnished when demanded by the Commissioner of Corporations and Taxation. The Attorney General may obtain an injunction restraining the further prosecution of business by a foreign corporation which refuses to pay the tax (G. L. Ter. Ed., C. 63, Sec. 75).

This same statute was before the United States Supreme Court in *Alpha Portland Cement Co.* v. *Commonwealth*, 266 U. S. 203, on a writ of error. The decision in that case was that the tax imposed by this statute was unconstitutional when imposed on a foreign corporation engaged exclusively in interstate commerce within Massachusetts. In the case at bar the Supreme Judicial Court of the Commonwealth of Massachusetts has ruled that the Appellant is not engaged exclusively in interstate commerce in Massachusetts and that the tax imposed by said statute is valid and not a direct burden on interstate commerce in contravention of the Commerce Clause embodied in Section 8 of Article I of the Constitution of the United States and that it does not deprive the Appellant of its property without due process of law in contravention of the 14th Amendment to the Constitution of the United States. The Appellant contends that it is engaged exclusively in interstate commerce in Massachusetts within the rule laid down in *Ozark Pipe Line Co.* v.

Monier, 268 U. S. 555, and irrespective of whether it is held to be engaged exclusively in interstate commerce in Massachusetts the said statute, as construed by the Supreme Judicial Court of the Commonwealth of Massachusetts is invalid as a direct burden on interstate commerce in contravention of Section 8 of Article I of the Constitution of the United States and that it is also invalid as depriving the Appellant of its property without due process of law in contravention of the 14th Amendment to the Constitution of the United States.

(c) The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts was filed September 16, 1935 and a final order was entered in accordance with such opinion on December 3, 1935. The application for this appeal was presented December 11, 1935.

Respectfully submitted,

ROBERT C. MCKAY,
Attorney for Appellant.

FILE COPY

JAN 24 1936

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 715

THE ATLANTIC LUMBER COMPANY,

Appellant,

vs.

COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS.

APPEAL FROM THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

PAUL A. DEVER,
Attorney General of Massachusetts.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 715

THE ATLANTIC LUMBER COMPANY,

Appellant,

vs.

COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS,

Appellee.

GROUNDS AGAINST THE COURT TAKING JURISDICTION OF THE APPEAL AND A MOTION TO DISMISS.

Now comes the appellee in the above-entitled case and says that this is an appeal from an opinion of the Supreme Judicial Court of Massachusetts filed September 16, 1935, and reported as *The Atlantic Lumber Company* v. *Commissioner of Corporations and Taxation,* 1935 Advanced Sheets 2053, upholding an excise tax imposed upon the appellant, a Delaware corporation, upon the ground that it was conducting an intrastate business in Massachusetts. The single issue calling for determination upon this appeal is whether

the appellant was carrying on a local business within the taxing state.

The basis for the decision of the Massachusetts Court appears from the decision, which states that——

> "The first point for decision is whether upon the facts already cited the taxpayer was carrying on intrastate business within the Commonwealth, or whether its business activities were confined exclusively to interstate commerce. Doubtless certain of its activities were interstate commerce; but others were not. The principal office of the taxpayer was in Boston. Its most active bank account was there. Corporate books and records were kept there; the location of its treasurer with all its implications was there; the dividends were paid and the meetings of its directors were held there. These are corporate functions which are not interstate commerce. That this constituted local and intrastate business which subjected the foreign corporation to the excise tax of this Commonwealth seems to us to be settled by the decision in *Cheney Brothers Co.* v. *Massachusetts*, 246 U. S. 147, where at pages 155, 156 was affirmed the decision of this court in *Marconi Wireless Telegraph Co.* v. *Commonwealth*, 218 Mass. 558, 576-579, as to the Copper Range Company and the Champion Copper Company. Those cases related to an earlier excise tax statute than the one here involved, but the decision turned on the precise point here raised, whether the business subjected to the tax was local or intrastate. The objections to that tax were based on the commerce clause of the Federal Constitution and on the due process and equal protection clauses of the Fourteenth Amendment. The entire decision of the United States Supreme Court with reference to those two corporations was in these words: 'COPPER RANGE COMPANY. This is a Michigan corporation whose articles of association contemplate that it shall have an office in Boston. It is a holding company and owns various corporate stocks and bonds and certain mineral lands in Michigan. Its activities

in Massachusetts consist in holding stockholders' and directors'' meetings, keeping corporate records and financial books of account, receiving monthly dividends from its holdings of stock, depositing the money in Boston banks and paying the same out, less salaries and expenses, as dividends to its stockholders three or four times a year. The exaction of a tax for the exercise of such corporate faculties is within the power of the State. Interstate commerce is not affected. CHAMPINION COPPER COMPANY. This is another Michigan corporation which maintains an office in Boston pursuant to a provision in its articles of association. It deposits the proceeds of its mining and smelting business in Michigan in Boston banks and, after paying salaries and expenses, distributes the balance in dividends from its Boston office. The management of its mine is under the control of a general manager in Michigan and he in turn is under the control of the company's directors. The meetings of the latter, which occur several times a year, are held in the Boston office. At these meetings the directors receive reports from the treasurer and general manager, vote dividends, elect officers, and authorize the execution of deeds and the like for lands in Michigan. These corporate activities in Massachusetts are not interstate commerce and may be made the basis of an excise tax by that State.' The decision of those two cases on this point has been cited with approval. *Ozark Pipe Line Co.* v. *Monier,* 266 U. S. 555, 566, 567. *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203, 217.''

The appellee further submits that the sole question at issue was settled by the case of *Cheney Brothers Co.* v. *Massachusetts,* and, therefore, says that there is no merit in the appeal, and moves that the said appeal be dismissed.

PAUL A. DEVER,
Attorney General,
Counsel for the Appellee.

(7358-C)